STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

RHONDA GOODENOUGH,

Appellant/Complainant,

vs. **PELRB CASE NO. 103-19**

N.M. CHILDREN, YOUTH AND FAMILIES DEP'T,

Appellee/Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Rhonda Goodenough's ("Appellant") appeal of Executive Director Thomas J. Griego's Summary Dismissal of the Prohibited Practices Complaint ("PPC") filed against New Mexico Children, Youth and Families Department ("CYFD"). The Board being sufficiently advised and with a vote of 3-0 finds as follows:

1. On August 19, 2019, Appellant filed a Notice of Appeal with the Board of Director Griego's Summary Dismissal of Appellant's PPC.
2. Attorney for Appellant, Rosario D. Vega Lynn, did not appear at the hearing held on September 10, 2019.
3. The Board attempted to reach Appellant's counsel by telephone (505-903-9411) but she could not be reached.
4. Attorney for Appellee, Kathryn Grusauskas appeared at the hearing on behalf of CYFD, but declined to comment on the appeal.
5. The Board elected to resolve the matters on the briefs without oral argument.

THEREFORE THE BOARD ratifies Director Griego's summary dismissal of the complaint and the complaint shall be closed.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

9-17-19
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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August 13, 2019

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Attn: Kathryn Grusaukas, Ass't. Gen. Counsel

Re: *Rhonda Goodenough v. N.M. Children Youth and Families Dep't; PELRB 103-19*

Dear counsel:

On August 7, 2019 I received the Respondent's Alternative Motion to Dismiss or for Summary Judgment. The Complainant filed her Response on August 8, 2018. Based on their submissions the parties' positions may be summarized as follows:

Respondent argues that the PELRB is without jurisdiction to consider the instant Prohibited Practice Complaint because of a pending disciplinary grievance appeal before the State Personnel Board arising out of similar facts. CYFD further argues that because Complainant was informed that she was not in the bargaining unit at the time she was promoted to Juvenile Probation Parole Officer (JPPO) II -Supervisor April 28, 2012 and JPPO Supervisor on July 7, 2012, the instant PPC is time-barred by operation of NMAC 11.21.3.9.

In response, the Complainant argues that CYFD improperly considers the JPPO II Supervisor position as a "supervisor" exempt from collective bargaining because the job duties are not consistent with how that term is defined by the PEBA, NMSA 1978 §10-7E-4(U) (2003). As a result, the position should be considered to be within an existing bargaining unit covered under a Collective Bargaining Agreement (CBA) between AFSCME, Council 18 and the State. More specifically, Complainant claims coverage of Article 13, Sections 1-3 of the CBA imposing terms for conducting and completing investigations of alleged misconduct by bargaining unit members and a 45-day deadline for imposing discipline after completion of such investigations. Complainant's response does not address the timeliness issue.

This letter constitutes my decision regarding Respondent's Alternative Motion.

STANDARD OF REVIEW

When deciding Motions to Dismiss, the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. See *Herrera v. Quality Pontiac*, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46. Dismissal on 12(B)(6) grounds is appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.,* 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces,* 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4. Here, I have relied on the parties' affidavits and other submissions so that it is appropriate to review it under the standard followed for Summary Judgment. The PELRB historically has followed the New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. *See AFSCME v. State of N.M., Regulation & Licensing Dep't,* 5-PELRB-2013, PELRB No. 124-12, 2013 WL 12205593, *6; *AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007). Summary Judgment will be granted when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.* 150 N.M. 123, 257 P.3d 943, (N.M. 2011); *Smith v. Durden,* 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.,* 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992).

MATERIAL FACTS

1. The Children Youth and Families Department (CYFD) is a public employer as defined by the Public Employee Bargaining Act ("PEBA") NMSA (1978) §10-7E-4(S) (2003).

2. Rhonda Goodenough is a public employee, employed by the Children, Youth and Families Department as a Juvenile Probation Parole Officer at various levels since December 6, 2003. First Amended Complaint ¶ 1 and Answer thereto).

3. AFSCME, Council 18 is the exclusive representative for a bargaining unit comprising Juvenile Probation Parole Officer I and II and has entered into a Collective Bargaining Agreement (CBA) with the State affecting classifications of employees of CYFD identified in that agreement. (AFSCME, Council 18 CBA Appendix R).

4. On August 29, 2014 CYFD requested the State Personnel Office (SPO) permit CYFD to change the existing job classification of Juvenile Probation Parole Officer (JPPO) series, requesting that the State Personnel Board adopt new classifications of

JPPO I, JPPO II and Supervisor. See minutes dated August 29, 2014 attached to CYFD's Motion as Exhibit 1. The Board approved CYFD's request.

5. Attached to CYFD's Motion as Exhibit 2 is the relevant classification identifying JPPO I as job code G10941 and JPPO II as job code G10942, both of which are expressly identified as being part of the bargaining unit represented by AFSCME, Council 18 and therefore covered by the referenced CBA.

6. The job classification "Juvenile Probation Parole Officer" was established on April 28, 2014.

7. The classification of Juvenile Probation Parole Officer Supervisor, like its predecessor, Probation Parole Officer Supervisor, was excluded from the bargaining unit covered by the parties' CBA prior to April 28, 2014 and continued to be excluded after that date. (Affidavit of Shane Youtz re: Joint Statement).

8. Because of the difficulty in administering temporary supervisory pay differentials, a new classification for Probation Parole Officer Supervisor was established on April 27, 2012. (Affidavit of Shane Youtz re: Joint Statement).

9. Representatives of the parties to the applicable CBA agree that both the job classification of Probation Parole Officer Supervisor established in 2012 and the Juvenile Probation Parole Officer Supervisor classification created in 2014, are not bargaining unit members. (Affidavit of Shane Youtz re: Joint Statement).

10. CYFD imposed discipline against Complainant later than the 45-day time period called for in Article 24, Section 3 of the CBA.

RATIONALE

A. THE PELRB HAS JURISDICTION OVER ALL ISSUES IN THIS CASE.

Respondent's argument that the PELRB is without jurisdiction and presents an improper venue to consider the instant Prohibited Practice Complaint because of a pending disciplinary grievance appeal before the State Personnel Board arising out of similar facts is an old argument rejected by this Board more than once, including one case involving the CYFD. See, I*n re: Robert Gallegos v. N.M. Children, Youth and Families Dep't.*, 2-PELRB-2015, PELRB No. 124-14 (April 15, 2015). In order to fulfill its legislative mandate this Board has been given the power and the duty to hold hearings on and determine complaints of prohibited practices. See NMSA 1978 §10-7E-9 (A)(3) and (B)(1). See also NMAC 11.21.3.1 *et seq*. The Board has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. §10-7E-9 (F).

CYFD does not dispute that it is a public entity subject to the PEBA nor does it contest that it is subject to the Act's prohibited practices section or that the instant complaint alleges that CYFD committed such a prohibited practice. The PPC herein is based on an allegation that CYFD refused or failed to comply with a 45-day limitation period in Article 26 Section 3 of a CBA between AFSCME, Council 18 and CYFD and otherwise interferes in Ms. Goodenough's bargaining rights protected by the PEBA, thereby violating the PEBA §§10-7E-19(B) and (H) or 10-7E-5. Those allegations raise issues that are solely within the purview of this Board. The jurisdiction of the State Personnel Board (SPB) over disciplinary matters is not implicated by this Board determining the alleged PEBA violations. Said another way, our exercise of jurisdiction to determine whether a violation of the PEBA has occurred does not implicate the State Personnel Act (SPA) and there is no conflict between the two Acts. It is this Board and this Board alone that is legislatively authorized to determine whether the PEBA has been violated - the SPB has no authority to do so.

Accordingly, although this matter arises out of many of the same facts as might Ms. Goodenough's disciplinary appeal before the SPB, it does not involve the same issues over which the SPB has jurisdiction. See, Letter Decision re: Motion to Dismiss in *AFSCME, Council 18 v. N.M. State Personnel Office and N.M. Corrections Dep't*; PELRB No. 116-18 dealing with this issue in the context of grievance arbitration. (That the scope of the parties' grievance arbitration includes disputes concerning the collective bargaining agreement does not mean that the union's claimed PEBA violations are therefore a proper subject of grievance arbitration. Only the PELRB has been delegated the statutory duty to determine claims of prohibited labor practices under the Act.) See NMSA 1978 §10-7E-9 (A) (3), citing to the Hearing Officer's Recommended Decision *In re: International Ass'n of Firefighters, Local 1687 and City of Carlsbad*; PELRB No. 308-17. The same rationale applies in the context of appeal rights pursuant to the State Personnel Act - the pending issues are not appropriate for resolution in the first instance by any agency other than the PELRB.

As in the *Robert Gallegos* case, *supra*, the question before me now is not whether a PPC touches upon pending disciplinary matters because the same facts may give rise to both a grievance and a PPC. The jurisdiction of the SPB is properly invoked to consider whether discipline is imposed in compliance with its own procedural rules, but it has no obligation to determine if the discipline was imposed in compliance with the CBA's procedural provisions or, indeed, whether the CBA applies at all. That is the province of the PELRB. Likewise, Complainant's allegations that the CYFD interfered with protected rights under the PEBA are not and cannot be before the SPB. Therefore, I conclude that the issue now before the PELRB is distinct from that on appeal before the SPB and referral of similar issues to the SPB does not present a challenge to our jurisdiction. I further conclude that the issues presented by the instant PPC are not within the jurisdiction of the SPB. Therefore, CYFD's Motion to Dismiss for lack of jurisdiction or improper venue is without merit, whether analyzed under the Rule 12(B)(6) standard or Rule 1-056 Summary Judgement standard. For the reasons stated above the Alternative Motion for Summary Judgment or to Dismiss on jurisdictional grounds is **DENIED**.

B. COMPLAINANT LACKS STANDING TO SEEK REDRESS FOR VIOLATION OF THE CBA IN QUESTION SO THAT A CLAIM UNDER SECTION 19(H) WILL NOT LIE. FURTHER, THE FACTS AS PLEAD DO NOT STATE A CLAIM FOR INTERFERENCE WITH COMPLAINANT'S RIGHTS UNDER SECTIONS 5 OR 19(B).

At the status and scheduling conference in this matter concerning pre-hearing dispositive motions that should be determined prior to a merits hearing, the parties discussed determining whether Complainant is a member of the bargaining unit covered by the contract in question. Assuming for the sake of argument that her exclusion from the bargaining unit as a "supervisor" violates the PEBA's definition of that term, the parties also discussed whether that exclusion constitutes an impairment of her bargaining rights in violation of Sections 5 and 19(B) of the PEBA. Although neither party briefed those issues, I find them to be dispositive of this case and so address them *sua sponte*.

New Mexico courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke authority to decide the merits of a case. See *ACLU of N.M.*, 2008–NMSC–045, ¶ 9, 144 N.M. 471, 188 P.3d 1222; D*eutsche Bank Nat'l Trust Co. v. Johnston*, 369 P.3d 1046 (N.M., 2016); see also *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.") *Id.* If these elements are not met, as a logical matter, a plaintiff generally cannot show that he or she has stated a cause of action entitling him or her to a remedy. *Id.*, citing *Key v. Chrysler Motors Corp.,* 1996–NMSC–038, ¶¶ 10–11, 121 N.M. 764, 918 P.2d 350. Thus, while a plaintiff's failure to state a cognizable claim for relief and a plaintiff's lack of prudential standing are not strictly jurisdictional, both implicate the "properly limited ... role of courts in a democratic society" and are relevant concerns throughout a litigation. *Id.*, citing *New Energy Econ., Inc. v. Shoobridge*, 2010–NMSC–049, ¶ 16, 149 N.M. 42, 243 P.3d 746 (internal quotation marks and citation omitted).

Concerning that part of the PPC alleging a violation of Section 19(H) because Ms. Goodenough was not afforded protections of the contract Article 24 Section 3, Complainant correctly points out that "It is not the rank nomenclature (corporal, sergeant, lieutenant, captain, etc.) that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act." However, that fact and the Board decisions so stating are immaterial in a case such as this where it is undisputed that the classification of Juvenile Probation Parole Officer Supervisor, which Ms. Goodenough holds, like its predecessor, Probation Parole Officer Supervisor, is and always has been, outside of the recognized bargaining unit. See affidavit of Shane Youtz regarding the Joint Statement by the State Personnel Office and AFSCME, Council 18 regarding the job classification of Juvenile Probation Parole Officer Supervisor, submitted August 12, 2019. That Complainant's job classification is not included in the recognized bargaining unit is dispositive on the question of

whether she is entitled to the protections of Article 24 Section 3 of the CBA. As the position is not within the unit covered by the contract it is not entitled to claim its protections.

There exists no indication that the union ever sought to represent workers holding the job in question and there is no history of accretion activity concerning the position. There is no authority for holding that the union is, or was, required to do so. A union is free to determine for itself whom it will and will not represent in a bargaining unit so long as that decision results in an "appropriate" unit. It would set a poor precedent to allow some sort of "implied" contract coverage by virtue of a position being "improperly" considered to be supervisory as that term is defined by the PEBA §4(U). Such reasoning would allow the possibility that a union could be compelled to represent job classifications it has expressed no interest in representing. This is an untenable result, particularly in view of the axiom that a unit need only be "an appropriate bargaining unit," not necessarily the "most" appropriate bargaining unit. See *NEA-Belen, Belen Federation of School Employees & Belen Consolidated Schools*, 1 PELRB 2 (May 13, 1994), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962); *Santa Fe Community College-AAUP & Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16). See also A*merican Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991).

Accordingly, the Complainant has no cognizable interest in the protections afforded to bargaining unit members under the CBA. The employer's "failure" or refusal to extend contract coverage to an employee who is not within the bargaining unit for whom the contract was negotiated cannot reasonably be construed to constitute an impairment of the Complainant's bargaining rights under the PEBA.

Similarly, Complainant's disagreement with the employer's classification of her job as supervisory and therefore exempt from collective bargaining, without more, does not lead to a conclusion that PEBA rights have been violated. There are no allegations that Complainant sought accretion into an existing bargaining unit, clarification of an existing unit to include her job or that she sought to establish a separate appropriate bargaining unit covering her position. Accordingly, the question whether her job is or is not a "supervisor" as that term is defined by Section 4(U), is immaterial. Assuming that she is correct, the mere fact that her position is subject to bargaining rights does not result in a conclusion that those rights have been violated absent any allegation that she sought to vindicate those rights by petitioning this Board for recognition of representation within a unit that includes her job. I can identify no theory under the facts plead by which Complainant could prevail.

CONCLUSION

For the reasons stated above, Complainant either lacks standing or fails to state a claim. This PPC shall be, and hereby is, **DISMISSED**, albeit for reason that have not been plead or briefed by the CYFD.

Having dismissed the PPC for the reason stated above, there is no need to reach the question of the timeliness of the Complaint considering the six-month limitations period in NMAC 11.21.3.9.

Either party may appeal this Dismissal to the Board by following the procedure and time limitation in NMAC 11.21.3.13.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

xc: Sandy Martinez, SPO